



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 19, 2003

Ms. Zandra L. Narvaez
Attorney
City Public Service of San Antonio
P.O. Box 1771
San Antonio, Texas 78296-1771

OR2003-5802

Dear Ms. Narvaez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 186213.

The City Public Service of San Antonio ("CPS") received a request for the salary of two named individuals. You state that you have provided the responsive information related to one of the named individuals to the requestor. However, you claim that the remaining requested information is excepted from disclosure under sections 552.104 and 552.133 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you acknowledge that CPS has not provided this office with the required documents within fifteen business days as prescribed by section 552.301. *See* Gov't Code § 552.301. Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Section 552.104 of the Government Code is a discretionary exception under the Public Information Act and, therefore, does not overcome the presumption that the submitted information is public information. *See* Open Records Decision No. 592 (1991) (governmental body may waive section 552.104). Therefore, you may not withhold the submitted information under section 552.104 of the Government Code. Normally, a compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision

No. 150 at 2 (1977). Section 552.133 of the Government Code provides a compelling reason to overcome the presumption of openness.

Further, we note that section 552.022 of the Government Code makes certain information expressly public, unless it is confidential under other law. One category of expressly public information under section 552.022 is “the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body[.]” Gov’t Code § 552.022(a)(2). As you claim that the submitted information is excepted from disclosure under section 552.133 of the Government Code, we address that claim. *See* Gov’t Code § 552.133(d) (section 552.022 inapplicable to information excepted under section 552.133).

Section 552.133 of the Government Code excepts from disclosure a public power utility’s information related to a competitive matter. Section 552.133(b) provides:

Information or records are excepted from the requirements of Section 552.021 if the information or records are reasonably related to a competitive matter, as defined in this section. Excepted information or records include the text of any resolution of the public power utility governing body determining which issues, activities, or matters constitute competitive matters. Information or records of a municipally owned utility that are reasonably related to a competitive matter are not subject to disclosure under this chapter, whether or not, under the Utilities Code, the municipally owned utility has adopted customer choice or serves in a multiply certificated service area. This section does not limit the right of a public power utility governing body to withhold from disclosure information deemed to be within the scope of any other exception provided for in this chapter, subject to the provisions of this chapter.

Gov’t Code § 552.133(b). A “competitive matter” is defined as a matter the public power utility governing body in good faith determines by vote to be related to the public power utility’s competitive activity, and the release of which would give an advantage to competitors or prospective competitors. Gov’t Code § 552.133(a)(3). Section 552.133(a)(3) lists thirteen categories of information that may not be deemed competitive matters. The attorney general may conclude that section 552.133 is inapplicable to the requested information only if, based on the information provided, the attorney general determines the public power utility governing body has not acted in good faith in determining that the issue, matter, or activity is a competitive matter or that the information requested is not reasonably related to a competitive matter. Gov’t Code § 552.133(c).

You state that the CPS Board of Trustees, which is a “public power utility governing body,” passed a resolution pursuant to section 552.133 in which it determined in good faith that information regarding executive pay beyond what is required to be disclosed by SEC regulations for investor owned utilities is a “competitive matter.” According to the

resolution, release of executive pay could allow competitors to assess potential offers to attract key CPS employees. The submitted information is not clearly among the thirteen categories of information expressly exempted from the definition of competitive matter, and we have no evidence that the CPS Board of Trustees failed to act in good faith. Accordingly, we agree that the submitted salary information constitutes competitive matters in accordance with the resolution and, therefore, is excepted from disclosure pursuant to section 552.133 of the Government Code.

Although you request that this office is a previous determination regarding executive pay and perquisites, we decline to issue such a determination at this time. This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "W. Montgomery Meitler".

W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/lmt

Ref: ID# 186213

Enc: Submitted documents

c: Ms. LaNell M. Taylor
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